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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 455

—o—

FRED J. MARTIN, Trustee (Objectant),
Petitioner,

—against—

EUGENE CAMPANARO, EDWARD GRIMM, JAMES MURPHY, JOHN WELLMAN, JACK CELLELLA, EDWARD THORN, DAVE BARTLEY, ANTHONY RAGOZZINO, JOHN MENCHEN, SAM NUSSO, JAMES URSO, LEON DOERR, FRANK BRUNO, EMIL ISOLA, JAMES RECLA, IRVING DRIESACKER, JOSEPH BRIENZA, THOMAS TOBIN, GEORGE FARINA, BERNARD COFFEY, GEORGE NADAR, DANIEL WEIR, SALVADORE CARELLI, BURNETT FULLER, JOHN ADAMI, ANGELO CASSANO, VINCENT CAMMARATA, CARMINE GIORDANO, PETER CACABRESE, WALTER REEVES, FRANCIS LOTZ, OTTO WOLPERT, LOUIS CAMPANARO, WALTER CVARNESKI, GEORGE MOGLEY and PETER WILCHA, (Claimants),
Respondents.

In the Matter of Suburban Bus Co., Inc.,
Bankrupt.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Fred J. Martin, Trustee in bankruptcy of Suburban Bus Co., Inc., respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment and order of that Court (R. 119), entered on June 5, 1946, which reversed an order of the United States District Court for the Southern District of New York, entered January 21, 1946, and remanded the cause for further proceedings in accordance with the opin-

ion of said Circuit Court of Appeals. The District Court's said order (R. 100, 101) adopted the findings of fact and conclusions of law of the Referee in Bankruptcy, dated October 26, 1945, dismissed the petition to review filed by the claimants (respondents herein) and affirmed the order of said Referee in Bankruptcy dated October 26, 1945. The said Referee's findings of fact and conclusions of law (R. 84-89) and his order (R. 90, 91) sustained the objections filed by the trustee in bankruptcy (petitioner here) to the claims filed by said claimants (respondents) against the bankrupt estate of Suburban Bus Co., Inc., and directed that all of said claims be expunged and disallowed. Your petitioner's instant petition is accompanied by certified transcript of the record in the case including the proceedings in the said Circuit Court of Appeals. Your petitioner submits and annexes hereto his supporting brief.

Opinions Below

The opinion of the Circuit Court of Appeals is found at pages 110 to 118 inclusive of the Record. The opinion of the District Court is found at pages 98 and 99 of the Record. The opinion of the Referee in Bankruptcy is found at pages 75 to 83 inclusive of the Record.

Statement of Matter Involved

For convenience of reference, your petitioner will be hereinafter referred to as "Trustee," respondents as "Claimants," Suburban Bus Co., Inc., the bankrupt, as "Suburban," and the labor union to which Claimants belonged as "Amalgamated."

Claimants, 36 in number, filed against Suburban's estate in bankruptcy individual unliquidated claims. Each of said proofs of claim (R. 3, 4) states that Suburban is indebted to the claimant for an unliquidated sum of money

in the form of back pay owed for services rendered from May 24, 1944 to May 3, 1945; that no part of said debt has been paid; that on April 30, 1945 the Regional War Labor Board for the Second Region found that claimant was entitled to back pay of an unliquidated amount for services rendered after May 24, 1944; that said back wages are entitled to a certain priority under Section 64a(2) of the Bankruptcy Act.

The Trustee objected to each of said claims (R. 7-10), a hearing was held before the Referee in Bankruptcy on said objections and testimony was taken at said hearing (R. 11-68). The said Referee sustained the objections and expunged the claims in their entirety (R. 83, 89,91). The Claimants filed a petition to review said determination (R. 92-95) which was filed on behalf of each of them and in their names by their attorney. As already stated, the District Court affirmed the order of the Referee in Bankruptcy and dismissed said petition to review. Each of the Claimants appealed to the Circuit Court of Appeals from the order of the District Court (R. 102, 103) and filed a statement as to the points and errors to be relied upon by said Claimants on said appeal (R. 107). Said Circuit Court of Appeals thereafter reversed said District Court's order.

The facts are as follows:

Claimants were employed by Suburban as operators, mechanics or helpers on Suburban's bus lines operated in and around the City of Yonkers, State of New York. Since May 1937 a labor union, Amalgamated, was the exclusive bargaining representative for said employees under successive yearly written agreements, fixing wages and working conditions, entered into between Amalgamated and Suburban during the period from May 1937 to May 24, 1944. On April 19, 1944 Amalgamated notified Suburban in writing that it wished to confer with it for modification

and revisions of the collective agreement for the ensuing year. On April 21, 1944 Suburban consented thus to confer (R. 75, 85, 60, 61). The last written contract, signed in May 1943, provided that it was to remain in full force and effect from year to year unless either party at least 30 days prior to the expiration of said agreement in any year notified the other in writing of its desire for termination, changes or modifications, to be effective for the succeeding year or years (R. 59).

Several months went by without an agreement being reached between Amalgamated and Suburban as to modification or revision of the terms of the previous written contract, but during all this time Suburban continued to pay, and Claimants continued to accept without protest, the wages and working conditions provided for in such previous contract (R. 85, 86). On December 7, 1944 when negotiations between Amalgamated and Suburban had reached a stalemate, the New York State Mediation Board referred the dispute to the National War Labor Board, and on December 18, 1944, the United States Secretary of Labor officially certified the dispute to the National War Labor Board (R. 86). Suburban objected to the jurisdiction of said Board over the person of Suburban on December 27, 1944 by letter addressed to the United States Department of Labor, U. S. Conciliation Service (R. 37, 46). Formal hearings were held on January 16, 1945 (R. 86). The Board's hearing officer on February 13, 1945 recommended an increase of ten cents an hour for all operators and a reduction in the straight-time work day to 8½ hour period each day, with such adjustments being retroactive to May 24, 1944. Suburban objected to these recommendations on the merits (R. 86).

On March 22, 1945, an involuntary petition in bankruptcy was filed against Suburban and it was adjudicated a bank-

rupt. On April 10, 1945, Fred J. Martin was duly appointed its Trustee in Bankruptcy (R. 86).

On April 30, 1945, the Regional War Labor Board issued its "directive order" sustaining the recommended increase in the former wage scale and directing a regular nine-hour day, forty-eight hour week and time and one-half for overtime, all retroactive to May 24, 1944. No petition for review was made by the bankrupt and by the terms of the order and the procedural rules of the Board, the interim order became final (R. 86). The "directive order" provided that the terms and conditions of the "directive" should be incorporated in a signed agreement "reciting the intention of the parties to have their relations governed thereby, as ordered by" the Board (R. 71). When requested to do so, the Trustee refused to execute such an agreement, at the same time disputing the jurisdiction of said Board over the Trustee (R. 73, 74).

From May 24, 1944 to May 2, 1945 (the date when the Trustee sold Suburban's assets by order of the Bankruptcy Court) (R. 17), Claimants continued working for Suburban at the same scale of wages set forth in the previous written collective agreement signed in May, 1943, receiving and accepting said wages each and every week from Suburban. Suburban's bookkeeper testified that Claimants had been paid such wages in full compensation for their services through May 2, 1945 (R. 17, 21, 22). She also testified that these men were paid each week their salary either by cash or by check for the period from May 24, 1944 to May 2, 1945, mostly by check; when paid by cash the money was given to them in an envelope, on the flap of which envelope there was written down the amount paid, the rate of pay, and deductions for hospitalization, union dues, and social security, besides indicating the week for which the work was done; that the men accepted the cash given to them in

said envelopes each week (R. 26, 27); that the weekly payroll checks paid to these men had the same information written in to advise the men of what they were being paid (R. 27, 28). She stated that there was nothing on Suburban's books to show that any of these claimants have any money coming to them from Suburban (R. 28).

The local division president of Amalgamated (R. 47) testified that the only rate of wages ever agreed upon mutually between Suburban and Amalgamated representing the claimants was a wage scale of 60¢ an hour to 85¢ an hour for bus operators, dependent on length of service; that that was the scale of wages set forth in the agreement entered into in May, 1943 between Suburban and Amalgamated and that no agreement was entered into in writing thereafter (R. 59); that the rates of pay set forth in that last agreement were paid by Suburban to these claimants (R. 60). No agreement in writing was ever entered into between Suburban or the trustee and Amalgamated or any claimants changing or modifying in any way the terms of employment or wages set forth in the agreement with Amalgamated dated May, 1943 (R. 61). Although Amalgamated met with Suburban and requested certain wage increases, Suburban did not agree to the same and the men got the same wages as they did before (R. 62, 63); that . o agreement, oral or in writing, was ever made between Amalgamated and Suburban or the Trustee, as to any change in the scale of wage over and above the scale set forth in the agreement of May, 1943 (R. 64).

Mr. Zseltvay, the witness called by the claimants, testified that on the envelopes in which the claimants received their weekly pay from Suburban the flap was ruled off showing the number of hours they worked, the amount of pay per hour or rate of wage, the total pay along with the deduc-

tions for taxes, social security, etc., and that each of the claimants would sign these flaps (R. 66). Petitioner contends that this constituted a receipt for payment in full.

The Referee in Bankruptcy who heard the testimony, in his findings of fact and conclusions of law, affirmed by the District Court, found that Claimants during the period in question continued to work and accept without protest the rate of wages which they had previously received under the old contract (R. 87), and that commencing on May 24, 1944, an implied contract arose out of the conduct of the parties, and the rights and obligations of the parties thereunder are to be measured as provided in the old contract; that by continuing to work and accept their previous rate of wages without protest, Claimants cannot now claim a higher rate of wages; they were paid in full (R. 88).

The District Judge in his opinion said:

> "The conduct of the parties negatives a holding that the claimants continued working upon a *quantum meruit* basis. A promise to make additional compensation cannot be inferred where the very claim is contested at all times by the one to be charged. The mere fact that an employee demands an increase in wages which is refused by his employer does not *ipso facto* give rise to a relationship in which the employee is to receive the reasonable value of his services. More is needed. c. f. *Meislahn v. Irving Nat. Bank*, 62 App. Div. 231, aff'd 172 N. Y. 631." (R. 99.)

Statement of Jurisdiction

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. section 347a).

It is submitted that the following authorities sustain this Court's jurisdiction: Erie R. Co. v. Tompkins, 304 U. S. 64, 78; Ruhlin v. N. Y. Life Insurance Co., 304 U. S. 202, 205; Gay v. Ruff, 292 U. S. 25, 30.

Questions Presented

The following questions of law are presented which petitioner believes are important enough to warrant a review by this Court:

1. Whether the Circuit Court of Appeals has decided this case in a way probably in conflict with the applicable law and decisions of New York State in that on the facts in the record no contract implied in fact or law to pay claimants on a *quantum meruit* basis can be spelled out?

2. Will not the decision of the Circuit Court of Appeals have the effect of creating unrest and suspicion in future labor-management relations in reference to bargaining negotiations as well as to lead to much litigation and possible strikes and lockouts in a field where the parties should not deal at arms length with each other?

3. Did not the Bankruptcy Act require these Claimants to obtain leave to appeal to the Circuit Court of Appeals?

Reasons for Granting the Writ

1. The Circuit Court of Appeals decided this case on the basis of an alleged contract "implied in fact" to pay claimants the reasonable value of their services. Inasmuch as the legal rights of the parties herein are based on contract law, and their dealings having taken place within the State of New York, then the common law of that State should have been applied (Erie R. Co. v. Tompkins, 304 U. S. 64, 78).

2. Under the decisions in the State of New York cited in the annexed brief the bankrupt estate and your petitioner should not be held liable to claimants on any *quantum meruit* basis whether on the theory of a contract "implied in fact" or in quasi-contract. The holding of the Circuit Court is, therefore, in conflict with applicable local law, as well as being untenable, on an important question of local law.

3. In this case an employer at the insistence of a labor union conferred and negotiated with said union as to a possible change in wages and working conditions. No results were accomplished and no new agreement was worked out with the union. The employer did not promise to pay the employees an increased wage, nor did it agree to any retroactive wage adjustment. Said employer protested the submission of the matter to the National War Labor Board, and objected to the recommendations of said Board. Despite the so-called wartime no-strike pledge given by organized labor (*i. e.*: the national unions) referred to in the Circuit Court's opinion (R. 114), it does not appear from the record that Amalgamated or the Claimants gave any such pledge to Suburban. There was nothing to prevent claimants from refusing to work unless Suburban promised them a higher wage. (This Court can take judicial notice that during the war and despite said pledge many unionized employees did go on strike.) Nor did claimants or Amalgamated take any steps to preserve any rights or claims for increased wages (R. 87). The fact is that claimants continued working for Suburban as before and on the same terms, accepting without protest the same rate of wages which they had previously received, and which was all that Suburban agreed to pay them. Two courts (the Referee in Bankruptcy who heard the evidence and observed the witnesses) found that such conduct on the part of the parties

did not give rise to a contract or right to recover in *quantum meruit*. The Circuit Court of Appeals in deciding otherwise has opened the door to a large amount of litigation as well as uncertainty and disharmony in situations of this character. Hereafter, if the Circuit Court decision stands, many an employer will hesitate to go into any bargaining conference with his employees or their union, because he might face a *quantum meruit* suit at any time thereafter within the period of the local statute of limitations if the negotiations reach a stalemate as here. The employees could go into the conference room with their "tongues in their cheeks"—wait to see what happens—if the negotiations bring about a result to their liking, then they would be satisfied—if not, then they could sue their employer for *quantum meruit*. This would really be dealing at arms length—a condition that would disrupt peaceful or harmonious relations between labor and management.

4. The Bankruptcy Act in section 24a thereof (11 U. S. C. A. section 24(a)) provides that when any order, decree or judgment involves less than $500.00, an appeal therefrom may be taken only upon allowance of the appellate court. None of the claimants has a claim which by any possibility can exceed $500.00, and yet none of the claimants asked the Circuit Court of Appeals for leave to appeal. While each claim as filed is unliquidated in amount, it is a money claim and asks for back wages. In order for each claimant to appeal as of right, each individual claim would have to amount to at least $500.00. The War Labor Board directive to which the claimants referred in their proofs of claim, provided for an increase of ten cents an hour in wages for a regular 48-hour work week with time and a half for overtime all retroactive to May 24, 1944 (R. 70, 86). Assuming that each claimant worked 48 hours a week during the period of fifty weeks involved in his claim, he would be

entitled at the most on the basis of the Board's award to $4.80 extra per week, thus amounting to $240.00 for a total of fifty weeks. Even if each claimant worked overtime every day (an extreme case), certainly that overtime would not amount to more than $200.00, and probably much less. Thus it appears that each claim involves less than $500.00, and it is submitted that the Circuit Court decided contrary to the federal statute (section 24a of the Bankruptcy Act) when it denied petitioner's motion to dismiss the appeal filed by claimants (R. 113) for their failure to ask said Circuit Court for an allowance of said appeal. If there is any question here as to how much each claim amounts to in money, then this Court, just as the Circuit Court could have done, may ascertain such amount by taking the oath of a party to the cause or by other competent evidence (28 U. S. C. A. section 231). The Circuit Court erred in treating the appeal as a single, consolidated one, and in effect considering all 36 claims as one claim aggregating over $500.00 (R. 113). In the first place there was no order of consolidation entered in this cause under F. R. C. P. 42 (a). Each claim was filed separately and constitutes a separate, individual claim, even though all 36 claims are based on the same set of facts and law. The amount of each claim if and when fixed and determined will necessarily be different, based on the respective kind of work done, time worked, etc. Hearing the claims in one hearing or on one appeal was for convenience and expedition and to save the claimants any added expense, but that did not thereby consolidate or group them in fact into one claim. In any event this was at most a procedural joinder or consolidation, but not one as a matter of substantive law under the statute. The claimants do not consist of one claimant, but 36 different ones, and each claimant must stand or fall on his own proof of claim.

5. It is respectfully submitted that for the legal reasons hereinbefore set forth and to the further covered in the annexed brief, and because of sound and compelling reasons of social policy having to do with an important public question, this petition for a writ of certiorari should be granted.

Dated: August 29, 1946.

ALFRED H. WASSERSTROM,
SIDNEY H. REICH,
Counsel for Petitioner,
Fred J. Martin, Trustee.

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In the Matter
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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinions below are referred to on page 2 of the petition.

Jurisdiction

The basis for jurisdiction appears at pages 7-8 of the petition.

Statement of the Case

A full and complete statement of the matters involved herein, insofar as your petitioner is concerned, is found on pages 2 to 7 of the petition.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that claimants are entitled to recover for their services on a *quantum meruit* basis.

2. The Circuit Court of Appeals erred in holding that claimants did not have to obtain leave to appeal from said court under section 24(a) of the Bankruptcy Act.

POINT I

Claimants are not entitled to recover on a quantum meruit basis.

Both the Referee in Bankruptcy and the District Court held that there was a contract implied in fact from the conduct of the parties that claimants would continue working at their old wage rate; that Suburban never agreed to pay more.

The negotiations or efforts for adjustment between Suburban and Amalgamated are without legal effect since they resulted in no agreement or settlement being reached. The National War Labor Board hearings were forced upon Suburban who resisted the claims for increased wages. The Board's directive admittedly created no rights enforceable by the claimants or which will support their claims. (See opinion of Circuit Court, R. 114.) Therefore there is nothing in the acts, words or deeds of the parties which created an implied or even quasi contract to pay claimants on a *quantum meruit* basis.

This Court indicated in the case of J. I. Case Co. v. N. L. R. B., 321 U. S. 332, that employees may make their own individual contracts with their employer as to wages and working conditions even though at the same time their union

representative may be negotiating with said employer in an attempt to work out a new collective agreement. Thus it was stated in said case at page 337:

> "Men may continue work after a collective agreement expires and, despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied agreements may be held to govern."

That is exactly what happened in the case at bar. And the express or implied individual agreements so made between Suburban and claimants whereby the latter continued working at the specified and definite wage rates previously worked out, should be held here to govern and encompass all the rights and obligations of the parties; bearing in mind that claimants voluntarily and without protest accepted such wages from Suburban as their working compensation each and every week during the period of almost a year after May 24, 1944, and signed itemized wage receipts for same. Since there was no promise or holding out by Suburban that their wages would be increased or that they would be paid the reasonable value of their services as such, these claimants are estopped from now claiming additional monies from the bankrupt estate. Claimants by their conduct showed an assent to the acceptance of the old wage scale for the period in question as full payment for their services. No *quantum meruit* implied in fact contract arose.

New York Tel. Co. v. Jamestown Tel. Corp., 282 N. Y. 365, 371.

Miller v. Schloss, 218 N. Y. 400, 406, 407.

Chinnery v. Kennosset Realty Corp., 286 N. Y. 167, 173.

In N. Y. Tel. Co. v. Jamestown Tel. Corp. *(supra)*, the N. Y. Court of Appeals stated the following at page 371:

> "Where, after the expiration of a contract fixing the reciprocal rights and obligations of the parties, they continue to do business together, the conduct of the parties may at times permit, or even constrain, a finding that the parties impliedly agree that their rights and obligations in connection with such business should continue to be measured as provided in the old contract."

In Miller v. Schloss *(supra)*, the same Court stated as follows (pages 406-407):

> "A contract cannot be implied in fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged; or where there is an express contract covering the subject-matter involved; or against the intention or understanding of the parties; or where an express promise would be contrary to law. The assent of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted. (Morse v. Kenney, 87 Vt. 445; Mathie v. Hancock, 78 Vt. 414; Hertzog v. Hertzog, 29 Pa. St. 465; Earle v. Coburn, 130 Mass. 596; Central Bridge Corporation v. Abbott, 4 Cush. 473.) Under the law and the stated facts it obviously cannot be held as a matter of law that the defendant is liable to the plaintiffs for the sum recovered by reason of his promise or contract implied in fact that he would pay them. In fact, *neither the complaint nor the trial proceeded upon that cause of action.*" (Italics mine.)

That is the situation with Suburban. It did not agree to pay increased wages or any wages different than those set forth in the old contract. It paid the same wages to claimants and they accepted them in full. The claim of *quantum meruit* was an after-thought—a last minute effort by claimants to sustain the recommendation for increased wages of the National War Labor Board, which the Courts have held not enforceable by court action. The proofs of claim of the claimants do not claim any right to *quantum meruit,* or any implied contract, but seem to be based wholly on the National War Labor Board's award.

Mutual assent is essential to the formation of a contract. The minds of the parties must meet on the precise terms of the agreement.

Lally v. Cronin, 247 N. Y. 58, 63.

So also as to contracts implied in fact.

1 Williston, Contracts (Rev. ed., 1936) section 3 (footnote 6).

There was no such assent or agreement in the case at bar as to increased wages or as to paying on a *quantum meruit* basis.

Where a contract of employment for a definite time is made and the employee's services are continued after the expiration of the time, without objection, the inference is that the parties have assented to another contract for a term of the same length with the same salary and conditions of service.

1 Williston, Contracts (rev. ed. 1936) Section 90.
Mason v. N. Y. Produce Exchange, 127 App. Div. 282, aff'd 196 N. Y. 548.
Adams v. Fitzpatrick, 125 N. Y. 124.

Mere talk or negotiations between an employer and an employee in the consideration of a possible increase in remuneration, without any definite arrangement or agreement being made or worked out for an increase in salary for any definite period or any stated amount, does not give rise to any contract or right to recover in *quantum meruit*. Particularly is that true where the employee has in the interim continued working on and accepted payment without protest of the wages given to him by his employer as compensation for his services thus rendered. In such event there is nothing from which a promise could be inferred that what the employee would receive would be based upon a *quantum meruit*, or that he was entitled to receive anything in addition to that already paid him.

Mackintosh v. Kimball, 101 App. Div. 494, 495, 497, 498.

Starbuck v. Fletcher Savings & Trust Co., 91 Ind. App. 695, 170 N. E. 863.

Another New York case in point is Summers v. Phenix Ins. Co., 50 Misc. 181, where an employee signed receipts for his monthly salary in a book kept by his employer which he knew contained an entry to the effect that his compensation was to be at a specified rate per annum (the amount actually paid to him and signed for). The Court held this to be an acknowledgment of what constituted the contract of the parties.

If it be claimed that there was a dispute pending at the time as to what was the wage to be paid claimants, then by accepting wages under the old contract each week and signing itemized receipts therefor, the claimants not only acknowledged that they had received payment in full of their compensation for their services each particular week,

but there was in addition an accord and satisfaction of the debt which would preclude any further claim on the part of claimants.

> "It is the settled law of this State that if a debt or claim be disputed or contingent at the time of payment, the payment when accepted of a part of the whole debt is a good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such cases is, was the dispute honest or fraudulent? If honest it affords the basis for an accord between the parties, which the law favors, the execution of which is the satisfaction."

Post v. Thomas, 212 N. Y. 264.

In accord:

Simons v. American Legion of Honor, 178 N. Y. 263.

Byrne v. Padden, 248 N. Y. 243

Clark v. Standard Rock Asphalt Corp., 233 App. Div. 536.

Rule 52 of the Federal Rules of Civil Procedure provides in part that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

U. S. v. Forness, (C. C. A. 2d) 125 F. 2d 928, 943.

Oneida Valley Nat. Bank v. Balish (C. C. A. 2d 1942) 130 F. 2d 255.

Rockmore v. Weiner, (C. C. A. 2d 1943) 131 F. 2d 595.

Under General Order 47 requiring a District Judge to accept a Referee's findings of fact unless clearly erroneous,

and Rules 52(a) and 53(e)(2) of F. R. C. P. requiring the Circuit Court of Appeals not to set aside a District Judge's findings unless clearly erroneous, appellate review by the Circuit Court from the District Court is the same as on a District Court's review of a Referee's order.

Morris Plan Industrial Bank v. Henderson, (C. C. A. 2d 1943) 131 F. 2d 975.

The Circuit Court of Appeals in reversing the District Court in the case at bar did not state that the findings of fact of the Referee in Bankruptcy, adopted and concurred in by the District Court, were clearly erroneous. For that reason alone the Circuit Court should not have reversed the lower courts.

It is respectfully submitted that the Circuit Court of Appeals did not follow the local law as set forth in the decisions of the New York Courts; had it done so, its decision would have been otherwise, and as already shown New York law governs on the question of the contract rights of the parties.

POINT II

The Circuit Court of Appeals should have dismissed the appeal of claimants because of their failure to obtain leave to appeal from said Court.

Section 24(a) of the Bankruptcy Act.

The jurisdiction of the Circuit Court of Appeals on appeals in bankruptcy cases must be determined by the special provisions of the bankruptcy statute (Bankruptcy Act, Sections 24, 25).

Ackert v. Baltimore & O. R. Co., (C. C. A. 4th) 115 F. 2d 455, cert. den. 313 U. S. 717.

An appellant must ask the Circuit Court of Appeals to allow his appeal when the order appealed from involves money less than $500.00 in amount.

In re Winton Shirt Corp., (C. C. A. 3rd) 104 F. 2d 777.
England v. Ducasse, (C. C. A. 9th) 104 F. 2d 760.
Robertson v. Berger, (C. C. A. 2d) 102 F. 2d 530, 531.

It was held by the Circuit Court of Appeals, 2nd Circuit in Hackner v. Guarantee Trust Co. of N. Y., 117 F. 2d 95, that where two or more plaintiffs, each having a separate and distinct demand, join in a single suit, each must be over the $3,000.00 limit, and the claims cannot be aggregated for the purpose of creating jurisdiction.

By analogy at least, this same rule should apply to the appeal filed in the case at bar by the claimants in the Circuit Court of Appeals. They constitute 36 claimants and each filed a separate claim against the bankrupt estate. Therefore, each claim had to amount to $500.00 or more in order to have an appeal as of right in the Circuit Court.

Conclusion

Your petitioner respectfully submits that the final determination by this Court of the conclusions of law involved in this case is of the utmost importance to the rights of employers and employees as well as unions in this country. The decision of the Circuit Court of Appeals is not only contrary to the applicable local law of the State of New York, but is contrary to sound principles of collective bargaining, as well as the freedom of individual employees in making binding agreements with their employers as to the wages to be paid to them in the interim while their

union is negotiating on possible wage adjustments with the employer, which this Court indicated could be done in the case of J. I. Case Co. v. N. L. R. B. *(supra)*. Unless the error in the Circuit Court decision is corrected by this Court the effect will be to create regrettable confusion and litigation in labor-management relations. Employers will hesitate (on the basis of the Circuit Court decision) to confer or negotiate with unions with the possibility of future lawsuits by the employees being brought against the employers to recover on *quantum meruit* if the negotiations stretching over some period of time do not result in any agreement being reached between the union and employer. And this would be the result despite the fact that the employees willingly received the wages under the old collective agreement from their employer for their work in the interim.

In view of the foregoing, we respectfully request that the petition for the writ of certiorari be granted.

Respectfully submitted,

Alfred H. Wasserstrom,
Sidney H. Reich,
Counsel for Petitioner,
Fred J. Martin, Trustee.

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OCT 9 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1946

No. 455.

FRED J. MARTIN, Trustee (Objectant),
Petitioner,
against
EUGENE CAMPANARO, EDWARD GRIMM, JAMES MURPHY, JOHN WELLMAN, JACK CELLELLA, EDWARD THORN, DAVE BARTLEY, ANTHONY RAGOZZINO, JOHN MENCHEN, SAM NUSSO, JAMES URSO, LEON DOERR, FRANK BRUNO, EMIL ISOLA, JAMES RECLA, IRVING DREISACKER, JOSEPH BRIENZA, THOMAS TOBIN, GEORGE FARINA, BERNARD COFFEY, GEORGE NADAR, DANIEL WEIR, SALVADORE CARELLI, BURNETT FULLER, JOHN ADAMI, ANGELO CASSANO, VINCENT CAMMARATA, CARMINE GIORDANO, PETER CACABRESE, WALTER REEVES, FRANCIS LOTZ, OTTO WOLPERT, LOUIS CAMPANARO, WALTER CVARNESKI, GEORGE MOGLEY and PETER WILCHA, (Claimants),
Respondents.

In the Matter
of
Suburban Bus Co., Inc., Bankrupt.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Suburban Bus Co., Inc., Bankrupt.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

On page 2 of Respondents' brief the statement is made that on April 19th, 1944 "Amalgamated notified Suburban of Amalgamated's desire to terminate the contract which would expire on May 23, 1944." That is not a correct statement and is not supported by anything in the record in this case. All that the notice stated was that Amalgamated

wished to confer with Suburban for modifications and revisions of the collective agreement for the ensuing year.

On page 5 of Respondents' brief a quotation is made from the case of the City of New York v. Davis, 7 F. (2) 566, which deals with an action based on quasi contract. That is not applicable to the case at bar because all of the courts below have concluded that a contract implied in fact arose from the conduct of the parties. The only difference is that the Referee in Bankruptcy and the District Court held that this implied contract was to pay the same rate of wages as the Respondents were paid prior to May 24, 1944 (R. 88), whereas the Circuit Court held that there was a contract implied in fact to pay the reasonable value of the services of Respondents (R. 114).

On page 5 of Respondents' brief it is stated "that petitioner does not claim that the monies paid respondents by Suburban after May 24, 1944, constituted the reasonable value of the services performed." That question is not involved in this case. The respondents herein as is true of almost all employees anywhere were not hired or paid on *a quantum meruit* basis, but rather for a specific rate of wage per hour which Suburban or the trustee paid to them and which they accepted without protest or reservation at the end of each work week. There was no agreement to pay them the reasonable value of their services as such, nor can such a conclusion be reached from the facts in this case or in considering the conduct of the parties.

On pages 7, 8 and 9 of the respondents' brief reference is made to the facts and opinion in the case of New York Telephone Company v. Jamestown Telephone Corporation, 282 N. Y. 365. In that case the Court stated that "the de-

fendant having given notice that the contract would end on March 1, 1932, did nothing in the interval which evinced any intention to withdraw the notice or which was in any way inconsistent with such notification * * * On the contrary, it affirmatively appears * * * that the defendant did not intend to withdraw its notice and always contended that the contract was at an end; and the plaintiff recognized that the contract was terminated * * *." There was no such notice of termination of the contract given in the case at bar. Furthermore the claimants by their conduct did not show that they regarded the contract at an end. They were paid and they accepted in full each week the same wages they had been previously paid. Furthermore Suburban never recognized that the contract was terminated but acted at all times in support of and insisting on said contract as being in full force and effect.

The statements made on page 10 of respondents' brief regarding what Amalgamated did or might have intended to do are not very material in this case. There is no proof in the record of any agreement as to retroactive application or as to any new or different wage scale. The implied contract which the Referee found was one that arose out of the conduct of the claimants and Suburban. Amalgamated is not the claimant against the bankrupt estate. Amalgamated did not work for the bankrupt. It was the employee-claimants who worked and performed services for Suburban and who were paid their wages in full each week for their services. While Suburban was a party to the negotiations and hearings wherein Amalgamated was "vigorously" asserting claims to wage increases, it should be borne in mind that at the same time Suburban was just as vigorously resisting these claims for any increase of wages. At no time in the negotiations or hearings did Suburban

agree with Amalgamated or the claimants on a mutual basis to pay increased wages and at no time did Suburban agree to make any back-pay adjustments with the claimants. Suburban insisted on paying the previous rate of wage and did so with the consent of the claimants. There is no basis in law or in reason to force a different rate or computation of wages upon Suburban retroactively and against its intent. Such intent is necessary as this has been held by the courts below to be a contract implied in fact.

On pages 12 and 13 of the respondents' brief reference is made to the case of Meislahn v. Irving National Bank. That case is not in point because in the instant case there was no promise by Suburban to pay these claimants more money than the weekly payroll paid to them and accepted by them, whereas in the Meislahn case *the employer promised the plaintiff an increase in salary.* In the Meislahn case when the plaintiff took on his new duties he asked about his salary and his boss told him "that would be made satisfactory the first of the year." He asked shortly after the beginning of the year where was his increase and his boss then said "that will be all right, you will get that later." The next month he asked again for his back pay and was assured again "it will be all right." The dissenting opinion in that case is premised on the basis that there was *no promise* made to give the employee an increase in salary. On the other hand the majority opinion (Judge Laughlin) states the following at page 238:

> "The jury were justified in finding that the plaintiff remained in the employ of the defendant in the expectation that *it would perform the agreement of its Cashier fixing a salary that would be satisfactory to him.*" (Italics mine.)

Negotiations for a new scale of wages in the Meislahn case would have been meaningless had there not been a

definite promise on the part of the employer to pay the employee an increase in wages. The claimants in this case completely ignore the fact that there was *no promise* by Suburban to pay these claimants additional or increased compensation. *This is the crux of the case.* Negotiations or attempted settlement do not constitute an agreement to pay an increase in wages, where as in the instant case these negotiations ended in a complete stalemate. On the other hand Suburban did pay and the claimants did accept during all this time wages in full each week on the basis of the previously existing agreed rate of wage.

The following statement is made on page 17 of respondents' brief: "The record indicates that the petitioner discharged each and every one of respondents under circumstances which amount to an unfair labor practice." That statement is without factual basis and there is nothing in the record in this case to support it. Furthermore the question of unfair labor practice was not involved in or passed on in the case at bar. Petitioner was and is a Trustee in Bankruptcy appointed by and responsible to the Bankruptcy Court, being under bond and subject to court order and direction at all times in carrying on the business of the bankrupt, and finally in selling the assets and business of the bankrupt. It is submitted that the statement quoted above from respondents' brief is unfair and apparently was made merely to confuse the issue or to create sympathy.

In answer to the argument contained at the top of page 18 of respondents' brief, suffice it to say that the claimants were not forced to work for Suburban and if they were not satisfied with the wages that Suburban was willing to, and did pay them, they did not have to work for Suburban and could have worked elsewhere and for anyone else. This would be true whether there was a union involved or not.

It is again respectfully requested that the petition for the writ of certiorari herein be granted.

Respectfully submitted,

ALFRED H. WASSERSTROM,
SIDNEY H. REICH,
Counsel for Petitioner,
Fred J. Martin, Trustee.

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SEP 20 1946

CHARLES ELMORE CROPLEY
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IN THE

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OCTOBER TERM—1946

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FRED J. MARTIN, Trustee (Objectant),

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Respondents.

IN THE MATTER

of

SUBURBAN BUS CO., INC.,

Bankrupt.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of Matter Involved

Respondents herein are thirty-six (36) claimants who filed thirty-six (36) identical unliquidated claims against the bankrupt estate, as employees of the bankrupt corpora-

tion, under Section 63a(4) of the Bankruptcy Act. The thirty-six (36) claims are all for back-pay of an unliquidated amount owed for services rendered from May 24, 1944 to May 3, 1945 by the claimants-respondents, as employees of the bankrupt, Suburban Bus Company, Inc., hereinafter called "Suburban". The claimants-respondents were operators, mechanics, and helpers on Suburban's bus lines in Yonkers and New York City. During that entire period from May 24, 1944 to May 3, 1945, and for seven successive years before that, their chosen and exclusive bargaining representative for the purpose of negotiating their wages and working conditions was Local Division 1134, of Amalgamated Association of Street, etc., Coach Operators of America, A. F. of L., herein called "Amalgamated" (fols. 225, 254).

On April 19, 1944, in accordance with the parties' customary practice and the provisions of their agreement then in force, Amalgamated notified Suburban of Amalgamated's desire to terminate the contract which would expire on May 23, 1944 and that it wished to confer with Suburban for modifications and revisions of the collective agreement for the ensuing year, May 24, 1944 to May 23, 1945 (fols. 177-185, 225, 255). By letter dated April 21, 1944 Suburban agreed to enter into such conferences on April 27, 1944 (fol. 255).

After many months, the parties could not come to a mutual agreement on a revised scale of wages, hours and overtime pay for the covered employees. In September, 1944, new interests purchased control of Suburban, but continued to operate in its name (fol. 226). Negotiations then reached a complete stalemate and on December 7, 1944, the New York State Mediation Board referred the dispute to the National War Labor Board (fol. 226). Thereafter, on December 18, 1944, the Secretary of the United States Department of Labor officially certified the dispute to the National War Labor Board (fol. 227).

A formal hearing was held on the dispute on January 16, 1945. The recommendations of the Board's hearing officer, dated February 13, 1945, were issued by the Board on February 16, 1945 (fol. 227). The primary recommendations were for an increase of 10 cents an hour in the scale of rates for all operators, and a reduction in the straight-time work day to 8½ hours, with overtime at time and one-half for all hours worked beyond 8½ hours each day. Further, it was recommended that the adjustments be retroactive to May 24, 1944, the date of the expiration of the former contract between Suburban and Amalgamated (fol. 227).

The Regional War Labor Board on April 30, 1945, issued its "Directive Order" sustaining the recommended increases in the former wage scale and directing a regular 9-hour day, 48-hour work week with time and a half for overtime, all retroactive to May 24, 1944 (Claimants' Exh. 3, fols. 205-215). The directive expressly decreed that the above "terms and conditions of employment shall govern the relations between the parties" (*idem.*). Suburban never petitioned the National War Labor Board for review of this order or any portion of it. Thus, by the terms of the order and the procedural rules of the War Labor Board the interim order became final.

During the entire period of the foregoing negotiations and hearings concerning the claimants' demand for increased pay and improved working conditions, all to be retroactively effective, Suburban continued to pay the claimants at the rates designated by the old contract. The then president of Suburban had offered to increase the hourly pay of certain of the operators, but that offer was rejected by the employees and Amalgamated continued to press for more sufficient increments (fols. 150-154, 158-161, 185-191).

Suburban was put into bankruptcy on March 22, 1945; on May 2, 1945, the assets of Suburban were sold, by order

of the Referee; and on May 3, 1945 all of the claimants-respondents herein were discharged. For the services rendered by them from May 24, 1944 to May 3, 1945, respondents never received any monies in excess of that paid under the wage scale which expired on May 23, 1944, nor have they received any part of the back-pay awarded by the Regional War Labor Board. Claims were duly filed on or about May 19, 1945 for the unliquidated amounts owing to the claimants-respondents (fols. 7-12, 312-313). These claims were for the reasonable value of the services rendered and were, therefore, not premised exclusively upon the Regional War Labor Board Award (see Proof of Claim, fols. 7-11; see also fols. 47-48, 199-200).

The petitioner's single motion objecting to the foregoing claims was granted by the Referee in a decision dated October 11, 1945 and the claims were expunged (fols. 223-273). The decision and order of the Referee were sustained in an order of the District Court for the Southern District of New York entered on January 21, 1946 (fols. 292-303), but unanimously reversed by order of the Circuit Court of Appeals for the Second Circuit entered on June 5, 1946. The said Circuit Court of Appeals remanded the case for further proceedings in accordance with the opinion written by Circuit Judge FRANK, wherein the claims were found to be provable to the extent that the reasonable value of the services performed by respondents for Suburban for the period from May 24, 1944 to May 3, 1945, the date of the discharge of all of the claimants-respondents, exceeded the sums paid to them by Suburban during that time.

It is to review this order of the said Circuit Court that the petitioner prays for a writ of certiorari. It is submitted that the decision of the said Circuit Court is completely in conformance with the applicable authorities, and the contentions of the petitioner are so insubstantial and devoid of merit that the writ should be denied by this Court.

I

The Circuit Court properly found respondents' claims to be provable under Section 63a(4) of the Bankruptcy Act.

Respondents have at all times relied upon the elementary principle that employees are entitled to the reasonable value of their services where there is no contract establishing the wage rates to be paid for such services. Indeed, petitioner has at no time, and has not upon this petition, denied that the following is the governing rule of law in such situations:

> "The action is based on *quasi* contract, and it is no defense to such an action to allege that the parties did not contract. The nature of the action in itself admits that the parties did not enter into a contract. But the fact remains that a public corporation, like a private individual, may be liable on a *quantum meruit* if, having the power to make a contract, but having made none, it has nevertheless enjoyed the benefit of work performed or materials furnished to it * * *." *City of New York* v. *Davis*, 7 F. (2) 566, 572-573 (Rogers, C. J.) (see cases cited at pp. 573-574; see also Restatement, *Contracts* § 5, Comment (a); Corbin, *Anson on Contracts*, pages 508-509).

It is, therefore, significant that petitioner does not claim that the monies paid respondents by Suburban after May 24, 1944 constituted the reasonable value of the services performed. Instead, petitioner has insisted that simply by continuing to work for Suburban after May 24, 1944, respondents entered into a new contract to continue working at the old wage scale and are, therefore, not entitled to recover the reasonable value of their services. This conclusion was expressly repudiated by the Circuit Court, and is contradicted by the record in the case as well as by the governing authorities.

A

There was no express contract between the parties after May 23, 1944 as to the wages to be paid.

The Referee has pointed out that the contract between Suburban and Amalgamated ran from May 23, 1943 and "expired on May 24, 1944" (fols. 245, 260). As early as April 19, 1944 Amalgamated, in accordance with that union contract, gave Suburban written notice of its desire "for termination, changes or modifications" of the contract (fol. 177). Thereafter, no new written contract was entered into. No proof was submitted, and no finding was made to indicate that the wages paid to the claimants were in accordance with any wage scale expressly agreed upon after May 23, 1944 (fols. 66-77, 177, 244, 255-256, 260). Indeed, the undisputed facts as to all the negotiations and hearings concerning a new wage scale for the period after May 23, 1944 are conclusive proof that no such wage scale was expressly agreed upon. Moreover, neither Amalgamated nor the individual employees ever signed any releases or waivers (fols. 194-198).

B

There was no implied contract between the parties to work for the old wage scale after May 23, 1944.

Contracts implied in fact, unlike those implied in law, require the same type of mutual assent required of all other true contracts. (*Carpenter* v. *United States,* 17 Wall. (U. S., 1873) 489, 495; *Baltimore & Ohio R. Co.* v. *United States,* 261 U. S. 592, 597; *Consolidated Products Co.* v. *Blue Valley Creamery Co.,* 97 F. (2d) 23, 28, cert. den. 305 U. S. 629; *Miller* v. *Schloss,* 218 N. Y. 400; 1 Williston, *Contracts,* § 3; Restatement, *Contracts,* § 5.) Where the facts, or the intentions of the parties, are inconsistent with the existence of

an alleged implied contract, then no implied contract can be found (*Miller* v. *Schloss*, 218 N. Y. 400, 406-7; *Chinnery* v. *Kennossett Realty Co.*, 286 N. Y. 167, 173). Consequently no new implied contract to continue under an expired or terminated contractual arrangement can be inferred from the mere continuance of an economic relationship after the expiration of that contract unless the parties clearly intended to make such a new contract.

An examination of the leading New York case of *New York Telephone Company* v. *Jamestown Telephone Corporation*, 282 N. Y. 365, which establishes the New York law as to the implied renewal of an expired or terminated contract, will demonstrate conclusively that there was here no implied contract to continue to work at the old wage scale. In that case the plaintiff and the defendant had entered into a contract wherein the plaintiff agreed to connect its telephone system with that of the defendant, the sole telephone company in the city of Jamestown. The telephone systems were thus linked to facilitate long distance calls into and out of Jamestown. Consequently, a schedule of tolls for such traffic was filed with the Public Service Commission and payments for the services rendered in connection with the joint traffic were fixed by the contract between the parties. Payments were made pursuant to this contract until March 1, 1932, when defendant stopped making payments to the plaintiff. Prior to that date the defendant had given to the plaintiff a notice of termination in the manner provided by the contract for its termination; and subsequent to that date the joint traffic had been continued. The defendant had not otherwise taken any steps which might be deemed inconsistent with its termination of the contract. Upon this state of facts, the plaintiff sued to recover amounts due from the defendant, for services rendered by the plaintiff after March 1, 1932, pursuant to the terms of the old agreement. The defendant admitted liability, but contended that the contract came to an end on March 1, 1932 and that thereafter

it was liable only for the reasonable value of services received by the defendant.

From the foregoing it is evident that the New York Court of Appeals was there required to fix the precise rule of law now applicable to the issue raised upon this petition. Indeed, the then Chief Justice of that Court, the late Judge LEHMAN, posed the issue as follows:

> "The issue between the parties is whether the amount to be paid must be measured in accordance with the terms of the express contract or in accordance with an implied contract to pay the reasonable value of such benefits" (282 N. Y. p. 371).

And it is, therefore, here decisive that the New York Court of Appeals unanimously affirmed a judgment in favor of the defendant on the grounds that the measure of recovery for the services rendered after the termination of the old contract is their reasonable value. The basis for that holding makes it evident that there is not the slightest suggestion of any conflict between the applicable New York law and the conclusion of the Circuit Court of Appeals herein:

> "Where, after the expiration of a contract fixing the reciprocal rights and obligations of the parties, they continue to do business together, the conduct of the parties may at times permit, or even constrain, a finding that the parties impliedly agree that their rights and obligations in connection with such business should continue to be measured as provided in the old contract. Even in such case, however, the reciprocal obligations arise from the new implied contract and, unless an intent to make such a new contract is expressed or may be fairly inferred from the conduct of the parties, the obligations of the parties are as matter of law not measured by the terms of the contract which has expired. (*Harlem Gaslight Co.* v. *Mayor*, 33, N. Y. 309.) No distinction, in principle, can be drawn here between a contract which, according to its terms, expires on a date

fixed by the parties at the time the contract is made and a contract which expires at a date fixed thereafter by notice given in accordance with the terms of the contract. (*Peoples Trust Co.* v. *Schultz Novelty & Sporting Goods Co.*, 244 N. Y. 14.) Here notice was so given and according to its terms the contract expired on March 1, 1932, unless that notice was withdrawn or rendered ineffective by subsequent acts or words of the parties. The problem presented upon this appeal is whether the notice was in fact withdrawn or rendered ineffective by the subsequent acts of the defendant.

The defendant having given notice that the contract would end on March 1, 1932, did nothing in the interval which evinced any intention to withdraw the notice or which was in any way inconsistent with such notification. Nothing occurred thereafter which dictates or, indeed, permits an inference that the defendant intended to withdraw its notice. On the contrary, it affirmatively appears . . . that the defendant did not intend to withdraw its notice and always contended that the contract was at an end; and the plaintiff recognized that the contract was terminated . . . The rights and obligations of the parties after March 1, 1932, cannot be measured by the terms of the contract which had come to an end on March 1st. Though after the expiration of an express contract, an implied contract containing the same terms may arise from the conduct of the parties, that is not the case here. Instead of implied acceptance of the old obligations, there was here express repudiation of such obligations" (282 N. Y., pp. 371-372).

Here, Amalgamated, the exclusive bargaining agent for the respondents and all the other employees of Suburban not only gave the notice required under the contract for its termination at its expiration date (fols. 177-185, 225, 255), but at all times after May 23, 1944 sought a new contract with a higher wage scale, shorter working hours, improved working conditions, etc., for the period beginning May 24, 1944. These were the requests to which Suburban had re-

fused to accede after protracted negotiations, resulting in the certification of the dispute to the National War Labor Board. Thus, not only had Amalgamated sent notice of termination of the contract to Suburban as a manifestation that Amalgamated did not consider the wage provisions of the contract effective after May 23, 1944, but at all times thereafter Amalgamated took every proper and legal measure at its disposal, short of striking (fol. 247), to obtain a new contract which would reflect its conception of a satisfactory wage policy. And at no time did Amalgamated act as if, or intend to be, bound by the contract which expired on May 23, 1944. On the contrary, Amalgamated, as the exclusive bargaining representative of the respondents, was all along seeking a new wage scale to be retroactive to the date of the expiration of the old contract.

Of course, during the period in question, the employees had to be paid and so the bankrupt continued to pay the respondents on the basis of the former agreed scale of wages and hours, the very scale which was then the subject matter of the dispute. But such action is a far cry from the conclusion that Amalgamated acted as if, or intended that, the wage provisions of the old contract continue and that, therefore, an implied contract arose between Amalgamated and Suburban. It may well be that each week, upon claimants' receipt of monies, Amalgamated might have sent a letter to Suburban stating that the acceptance of such payments was "without prejudice to their rights as might later be determined" in the manner suggested by the Referee (fols. 245-246). But the Referee himself found that Suburban was a party to the negotiations and hearings wherein Amalgamated was vigorously asserting claims to wage increases, to be retroactive to May 24, 1944, on behalf of its members (fols. 227-228). This put Suburban on notice just as surely as would the procedure suggested by the Referee.

Further, the fact noted by the Referee (fol. 247) that Amalgamated did not call the men out on strike, but, in-

stead, sanctioned their continuance on the job, affords no inference that the old contract was renewed; particularly since, from May 23, 1944 to May 3, 1945, Amalgamated was observing the no-strike pledge given by labor during wartime. Indeed, even this aspect of the case at bar is governed by *New York Telephone Company* v. *Jamestown Telephone Corporation*, 282 N. Y. 365. For there too it was apparently contended that the continuance of the rendition and the receipt of services prescribed by the old contract after the notice of termination was inconsistent with that notice of termination and instead implied a renewal of the old contract. This contention was rejected by the Court of Appeals (see 282 N. Y., pp. 374-375) and at 282 N. Y., page 375 it was pointed out:

> "Continuance of a joint service to the public, which neither party could lawfully discontinue without permission of the Public Service Commission, is not in law or in fact inconsistent with notice of termination of a contract, fixing, as between the parties, rights and obligations in the performance of the joint service."

Thus, the undisputed facts here show: (1) Amalgamated and the respondents were seeking wage increases retroactive to May 24, 1944; (2) Suburban was fully aware of Amalgamated's efforts because Suburban was a party to the negotiations and hearings on the proposed wage increases, and, indeed, Suburban actually proposed a certain wage increase (fols. 150-154); and, therefore, (3) no implied contract to work for the old wage scale here existed since Amalgamated never intended that, or acted as if, the old wage scale was still in effect. At no point in the record is there the "mutual agreement and intent to promise" (1 Williston, *Contracts*, § 3) or "manifestation of mutual assent" (Restatement, *Contracts*, § 3; see also § 5, Comment a), required by elementary contract law in order to give rise to an implied contract to receive the old wage scale.

These conclusions are in nowise affected by the individual claimants' receipt of the weekly pay upon which they depended for their sustenance. The record amply demonstrates that the acceptance of that pay by the respondents was no express or implied relinquishment by them of the right to the reasonable value of their services, for at the very time of the receipt of their pay the respondents knew of and supported their duly constituted representative in its negotiations for a pay increase which would be retroactive (fols. 191-195). Nor is it contended that the respondents at any time signed any releases or waivers to the favor of the bankrupt (fols. 194-198).

In view of the undisputed fact that Amalgamated was the exclusive bargaining representative of the employees and Amalgamated was at all times actively asserting the right of those employees to retroactive pay increases before the War Labor Board, the exclusive forum, it was, therefore, unnecessary—indeed, improper—for any member of Amalgamated to take independent steps to reserve his rights. (*J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332; *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 312 U. S. 342.) Accordingly, the course of conduct of the parties created no contract between Suburban and the individual employees.

Moreover, even if the respondents did sign a receipt in full when being paid, that fact would not be controlling so long as there were negotiations for a new scale of wages. A similar conclusion was reached in a New York case where no union representative was involved. In *Meislahn* v. *Irving National Bank*, 62 App. Div. 231, affd. 172 N. Y. 631, plaintiff was suing in *quantum meruit* for the reasonable value of services performed by him as a check clerk for defendant from May 31, 1899 to June 30, 1899. During that period he received a regular salary, and "signed a receipt in full" (62 App. Div. 234), although he had been negotiating throughout for a wage increase commensurate

with the new duties he performed after May 31, 1899. The Appellate Division for the First Department sustained the judgment entered in favor of the plaintiff, and expressly found that the receipt and acceptance by plaintiff of salary on the basis of his old scale was not conclusive of plaintiff's rights to recover in *quantum meruit*. No case relied upon by petitioner (see Petitioner's Brief, pp. 17-18) contradicts the foregoing principle that an expired or terminated contract will not preclude a recovery in *quantum meruit* for services rendered after its expiration or termination where the entire pattern of the conduct of the parties is inconsistent with the continuance of the old contract. And the single circumstance of the receipt of monies will not, according to the New York law, prevail over such an entire pattern to effect either a release or a renewal of an expired or terminated contract.

Ryan v. *Ward*, 48 N. Y. 204;
Mosel v. *Frank Brewing Co.*, 2 App. Div. 93.

Thus, the applicable New York authorities make it plain that there was no contract to work for the old wage scale after May 24, 1944, and that respondents are not otherwise barred from receiving the reasonable value of the services rendered by them for Suburban after that date.

II

The Circuit Court of Appeals properly exercised its appellate power of review.

Petitioner argues that the respondents' failure to move formally for leave to appeal to the Circuit Court from the decision of the District Court is a reason for granting the writ sought by petitioner (Petitioner's Brief, pp. 20-21). This argument is premised upon the section of the Bankruptcy Act which provides that when any order, decree, or

judgment involves less than $500.00 an appeal therefrom to the Circuit Court may be taken only upon allowance by the appellate court (Bankruptcy Act, § 24a; 11 U. S. C. A. § 24(a)).

The fallacy of petitioner's position is that nowhere in the record does it appear that respondents' claims, either singly or in the aggregate, are less than $500.00. The claims are unliquidated claims, and petitioner's efforts to calculate in advance the amount of those claims are both futile and misleading. For even if respondents' claims be considered singly, still no records have been submitted to indicate the number of hours worked by each of the respondents. Moreover, petitioner's reckoning employs only the hours and wage rates recommended by the Regional War Labor Board which was predicated upon a stabilization program and may be considerably less than the reasonable value of respondents' services for which the claims herein have been filed.

The indeterminate feature of respondents' claims bring them outside the scope of Section 24a. That section is not interpreted merely to mean that an appeal as of right lies in those cases involving more than $500.00, but, rather, to mean that allowance must be obtained only where less than $500.00 is involved. Consequently, only when it is clear that less than $500.00 is involved need a claimant apply for leave to appeal to the Circuit Court of Appeals.

> "* * * § 24a of the Chandler Act, 11 U. S. C. A. § 47(a) * * * gives us a broader jurisdiction than we had under §§ 24a and 24b, as they stood before 1938 * * * for it authorizes appeals on the law and the facts, not only in 'controversies,' but in 'proceedings in bankruptcy.' Two provisos are annexed to it, the first need not concern us, but on the second this motion turns. It reads that 'when any order * * * involves less than $500,' the appeal requires our 'allowance,' so preserving a vestige of the discretionary jurisdiction conferred by the amendment

> of 1926. We think that it means, not that our jurisdiction is discretionary whenever the order 'involves' anything except money of more than $500 in amount, but only when it 'involves' money alone, and less than $500. Our reasons are drawn both from the letter and the apparent purpose. Literally, an order like that at bar does not 'involve less than $500': since it involves no money at all, it cannot involve less than any sum, for the comparative necessarily implies the characteristic. So much for the words. As to the purpose, the exception, which seems to have been drawn from § 25(a) (3), 11 U. S. C. A. § 48, was apparently designed to exclude trifling disputes." (*Robertson* v. *Berger,* 102 F. (2d) 530, 531 (C. C. A. 2); see also, *In re Winton Shirt Corp.,* 104 F. (2) 777 (C. C. A. 3).)

Thus, the indeterminate amount of respondents' claims, which patently constitute more than a "trifling dispute," make it plain that the Circuit Court properly reviewed the order of the District Court herein upon respondents' notice of appeal (fols. 304-309).

Any doubt as to the propriety of the action of the Circuit Court should be dispelled by Circuit Judge FRANK'S observation:

> "• • • obviously the claims aggregate more than $500; the Referee passed upon the claims as a group; the claimants, in effect, consolidated their claims in their petition for review, without objection from the Trustee; and the judge treated them as if consolidated. Such consolidation was proper, under F. R. C. P. 42 (a) which applies here under General Order 37" (Record on Appeal, p. 112).

It is to be observed that what was before the Referee was the petitioner's single motion addressed to all the claims and that there was before the District Court and the Circuit Court the resulting single order expunging all the claims (fols. 19-30; 268-273). Thus, by petitioner's own computa-

tions, as observed by the Circuit Court of Appeals, far more than $500.00 was involved in the single order from which this appeal was taken.

Of course, the foregoing result is neither affected by the fact that respondents did not move for consolidation (*Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285; 3 *Moore's Federal Practice* (1938), § 42.01, p. 3049); nor is it affected by those cases wherein it was held that claims may not be aggregated to total over $3,000 for the purpose of creating jurisdiction (see Petitioner's Brief, p. 21), since Section 24a does not deny the Circuit Court jurisdiction to review cases involving less than $500.00 but merely makes the review of such cases discretionary with the Circuit Court.

In any event it is anomalous for the petitioner to assert that the Circuit Court's action was improper, because it did not formally allow leave to appeal, since that Court ultimately reversed the decisions of the Referee and the District Court in order to sustain the claims of the respondents herein. This action by the Circuit Court makes it indisputable that the alleged failure of the respondents to obtain leave to appeal presents no basis for the granting of the writ sought by the petitioner.

III

The decision of the Circuit Court is consistent with the public policy of harmonious collective bargaining.

Upon this petition for a writ of certiorari, the petitioner has made the novel assertion that the right of an employee to obtain the reasonable value of his services will

> "* * * create regrettable confusion and litigation in labor-management relations. Employers will hesitate (on the basis of the Circuit Court decision) to confer or negotiate with unions with the possibility of future lawsuits by the employees being

> brought against the employers to recover on *quantum meruit* if the negotiations stretching over some period of time do not result in any agreement being reached between the union and employer" (Petitioner's Brief, p. 22).

It is indeed difficult to appreciate how an employee's right to the reasonable value of his services can be considered as

> "* * * a condition that would disrupt peaceful or harmonious relations between labor and management" (Petitioner's Brief, p. 10).

A more enlightened approach to modern labor relations would make it apparent to the petitioner that collective bargaining is facilitated where the parties thereto are aware that orderly, legal processes rather than economic warfare are available when employees are denied the reasonable value of their services.

But petitioner's contentions in this regard must be viewed in the context of the particular record presented upon this petition. For there is considerable irony in petitioner's solicitude for harmonious collective bargaining. The record indicates that the petitioner discharged each and every one of respondents under circumstances which amount to an unfair labor practice. Indeed, that discharge, stalemating and terminating the contract negotiations which would have contained some retroactive provision for the period subsequent to May 23, 1944, was the genesis of this litigation and it is, therefore, improper for petitioner to conjecture that:

> "* * * employees could go into the conference room with their 'tongues in their cheeks'—wait to see what happens—if the negotiations bring about a result to their liking, then they would be satisfied—if not, then they could sue their employer for *quantum meruit*" (Petitioner's Brief, p. 10).

The mockery of petitioner's profession of solicitude for avoiding "strikes and lockouts" (Petitioner's Brief, p. 8)

is pointed up by the fact that his petition here invites employees to strike and, indeed, would relegate them only to that right to enforce their demands. Thus, petitioner asserts that respondents waived their right to the reasonable value of their services because, instead of striking, they continued to work for Suburban under labor's wartime no-strike pledge, after May 23, 1944:

> "Despite the so-called wartime no-strike pledge given by organized labor (*i. e.*: the national unions) referred to in the Circuit Court's opinion (R. 114), it does not appear from the record that Amalgamated or the Claimants gave any such pledge to Suburban. There was nothing to prevent claimants from refusing to work unless Suburban promised them a higher wage" (Petitioner's Brief, p. 9).

This contention of the petitioner makes it unnecessary to elaborate any further that the public policy of harmonious collective bargaining would not be served by granting petitioner the writ sought.

CONCLUSION

The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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